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THE INSUFFICIENCY OF INTERNATIONAL LEGAL PERSONALITY OF KOSOVA AS ATTAINED THROUGH THE EUROPEAN COURT OF HUMAN RIGHTS: A CALL FOR STATEHOOD

ILIRIANA ISLAMI*

INTRODUCTION

In recent decades, a proliferation of nonstate actors has changed the landscape of the international community. We are witnesses to the fact that during the twentieth century, international law underwent what might be described as a metamorphosis.¹ Essentially, international law evolved from a system primarily concerned with the regulation of the behavior of states to one in which the rights of individuals hold a central focus.² Thus, the armor of absolute national sovereignty was pierced, and the relationship between a state and its citizens became a matter of concern for the global community.³ Such an evolving consciousness resulted in a plethora of international treaties concerning human rights and fundamental freedoms, such as the Universal Declaration of Human Rights;⁴ the International

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1. See Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 269 (2001).

2. Antonio Cassese, *Individuals*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 113, 113 (Mohammed Bedjaoui ed., 1991). Cassese commented that:

It is well known that States and insurgents are "traditional" subjects of the international community, in the sense that they have been the *dramatis personae* on the international scene from the beginning. Recently, especially after the Second World War, other poles of interest and activity have gained international status: international organizations; "peoples" finding themselves in certain conditions and being endowed with a representative structure (i.e. liberation movements); and individuals. The emergence of these "new" subjects is a distinct feature of modern international law.

Id.

3. The key shift in focus came after World War II, when international law began to concentrate on states' treatment of their own citizens; that is, international law began to focus on human rights, an area that was previously thought to lie exclusively within the realm of internal, domestic law. Peter E. Quint, *International Human Rights: The Convergence of Comparative and International Law*, 36 TEX. INT'L L.J. 605, 605 (2001).

4. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. pt. 1, at 71, U.N. Doc. A/810 (1948).

Covenant on Civil and Political Rights;⁵ the International Covenant on Economic, Social and Cultural Rights;⁶ the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention of Human Rights" or "ECHR");⁷ the American Convention on Human Rights;⁸ and the African Charter on Human and Peoples' Rights.⁹ The result, in Kosova at least, has been an attempt to define the polity in terms of human rights. Thus, the mantra "Standards before Status," a policy under which Kosova must achieve certain human rights standards (among other standards) before the international community will even begin to discuss final status.¹⁰

The state, however, remains a critical component of international law and international relations.¹¹ Because "certain substantive values in contemporary international law pose real challenges to the legitimacy of [sovereign] statehood as a basis for international [social] order,"¹² I begin with a discussion of the challenges and new approaches to statehood. I then discuss the problematic, but very real, immunity of the U.N. Mission in Kosova ("UNMIK") and the Kosovo Force ("KFOR"). I argue that Kosovars should have remedies available to them in the European Court of Human Rights against these entities. Almost anyone has standing to sue in the European Court of Human Rights, but only states signatory to the European Convention of Human rights have obligations. Kosovo, not having an international legal personality, cannot sign the Convention, and thus one alleging abuse of rights in Kosovo has no remedy before the Court. I argue that Kosovars should have remedies available to them in the European Court of Human rights. At the same time, I argue that defining Kosova's polity in terms of human rights is akin to putting the cart before the horse. Human rights "cannot form a meaningful basis for [a] social order"¹³ because the implementation of those rights relies on conceptually inde-

5. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter *Covenant on Civil and Political Rights*].

6. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *Covenant on Economic Rights*].

7. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention of Human Rights*].

8. American Convention on Human Rights: "Pact of San José, Costa Rica," Nov. 22, 1969, 1144 U.N.T.S. 123.

9. African [Banjul] Charter on Human Rights and Peoples' Rights, adopted June 27, 1981, 21 I.L.M. 58.

10. Standards for Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/PR/1078 (Dec. 10, 2003), at <http://www.unmikonline.org/press/2003/pressr/pr1078.pdf>.

11. Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 407-47 (1999).

12. Martti Koskeniemi, *The Future of Statehood*, 32 HARV. INT'L L.J. 397, 397 (1991).

13. *Id.* at 399.

pendent and international political institutions.¹⁴ Ultimately, I conclude that, while Kosovars should be able to take full advantage of the European Court of Human Rights, Kosovars also need to be able to obtain relief against UNMIK, KFOR, and other entities in the national courts of an independent Kosova. In Kosova, human rights standards can best be exercised through statehood itself.

I. CHALLENGES TO "SOVEREIGN STATEHOOD" UNDER INTERNATIONAL LAW

Interpreting the tragic breakup of the former Yugoslavia posed a real challenge for those who argued that sovereign statehood should no longer serve as the basis of international law.¹⁵ For the most part, new approaches to statehood sought to redefine international law in the context of new processes and recent developments, such as globalization¹⁶ and human rights.¹⁷ In this respect, the quick imitation around the world of new trends involving, among other things, food, architecture, life styles, and fashion embodies our conception of "modernity."¹⁸ Likewise, political life has been transformed qualitatively during the latter part of the twentieth century. As Michael Donelan notes:

In the past, each country had separate fundamental problems; the present problems face all men in all countries; they are common problems. . . . The problems and their solutions . . . are beyond the capacity of 150 separate sovereign states. The old political organisation of the world corresponds no longer to the technological abilities and appetites of modern man and the consequent dangers.¹⁹

Because modernity appears to be "inherently globalising,"²⁰ the Westphalian model of international relations is seriously incomplete for the future. As understood at Westphalia, the legal order is a system of contrac-

14. *Id.*

15. The tragic break up of Former Yugoslavia raised many questions, including whether the demise of the nation-state would lead to international peace. It also raised the question of whether development of human rights law is properly conceptualized as the "savior" of the individual from the grips of the perceived tyrant, the sovereign state.

16. Globalization has been described by Twining as "those processes which tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does not penetrate to every part of it." William Twining, *Globalization and Legal Theory: Some Local Implications*, 49 CURRENT LEGAL PROBS. 1, 2 (1996).

17. See, e.g., Right of Peoples to Peace, G.A. Res. 39/11, U.N. GAOR, 39th Sess., Supp. No. 51, at 22, U.N. Doc. A/39/51 (1984); Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986).

18. See MICHAEL COOK, A BRIEF HISTORY OF THE HUMAN RACE (2003).

19. Michael Donelan, *A Community of Mankind*, in THE COMMUNITY OF STATES 140, 142 (James Mayall ed., 1982).

20. ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 63 (1990).

tual obligations among independent states. Now, this legal fiction is supplemented by an as yet unarticulated new world order.²¹ This new approach to political globalization is based on the observation that the national-international boundary is evaporating,²² a phenomena visible in the displacement of national and regional economies by a global economy.²³ As long as there is no compatibility between globalization and the concept of sovereign statehood, the Westphalia model will remain a largely outdated paradigm.²⁴

But it is not only reality that challenges the Westphalian preoccupation with states. Critics and international lawyers have worried about the "persistent étatism of the international polity, and consequently of international law."²⁵ Two commonly formulated kinds of criticism of statehood are moral criticism and sociological criticism. Moral critics argue that "the very notion of sovereign statehood strengthens the national egoism that has been responsible for so many cataclysms of the present century."²⁶ In terms of human rights, moral critics claim that the self-interested behavior of states should be replaced "with behavior that conforms to global conceptions of justice."²⁷ This rhetoric is often heard "in reference to achieving a more equitable economic distribution among states."²⁸ Considering the difficulty achieving an equitable distribution presents, it has been suggested that general rules should be replaced with "flexible standards of reasonableness and international equity."²⁹

Sociological critics, on the other hand, stress the factual interdependence that has left "sovereignty" with a marginalized role.³⁰ For instance, the global capitalist system has reduced the influence national governments possess over adjusting their national economies. Similarly, the insufficient capacity of individual states to tackle the universal problems associated

21. Donelan, *supra* note 19, at 140, 142.

22. Philip Allott, *The Emerging Universal Legal System*, 3 INT'L L.F. 12, 14-15 (2001). There exists a plethora of definitions of globalization, however, the common element to all such definitions is the acknowledgement that "the national-international frontier is evaporating. Social reality is now flooding in both directions across the frontier, including economic transactions and consciousness transactions (religious, cultural, political). Internal social reality in most countries is now being substantially determined by external social reality." *Id.*

23. Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 5-6 (1999).

24. *Id.* at 7.

25. Koskeniemi, *supra* note 12, at 401.

26. *Id.*; see also James D. Wilets, *The Demise of the Nation-State: Towards a New Theory of the State Under International Law*, 17 BERKELEY J. INT'L L. 193 (1999).

27. Koskeniemi, *supra* note 12, at 401.

28. *Id.* at 401-02.

29. *Id.* at 402.

30. *Id.*

with regulating transnational commercial business and the permanent threats of international terrorism, drug trafficking, and the like further marginalizes the role of national governments.³¹

Additionally, the protection of human rights is a powerful mainstream force that can render statehood less important. For instance, the prohibition of arbitrary deprivation of life is generally accepted as a norm *jus cogens*.³² (Theoretically, state parties are bound *pacta sunt servanda* to fulfill the obligations under human treaties through their introduction into the domestic legal system.)³³ In this regard, forums such as the Organization for Security and Co-operation in Europe ("OSCE"), the Council of Europe, and the United Nations Human Rights Commission are developing and strengthening mechanisms to curtail state power. Such developments may even have supported claims regarding the customary character of certain core restraints on the power of states.³⁴

A. *The Role of Human Rights Adjudication in Eroding the Power of the State*

The adjudicatory processes involved in international human rights enforcement have also contributed to the erosion of state power. While often overlooked, the phenomenon of judicial globalization, where the process of judging, lawyering, and judicial outcomes themselves are affected by the mounting influence of international bodies, has no doubt impacted state

31. *Id.*

32. DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 437 (2002); *see also* Human Rights Committee, General Comment No. 24(52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, at para. 10 (1994).

33. P.K. MENON, THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS 55 (1992). The rule of *pacta sunt servanda* exists under customary international law and asserts that a state must perform its obligations under a treaty in good faith. "The rule has been the cornerstone of international law from its earliest origins and it has acquired great importance for the stability and development of international relations as instruments of peace and as a mechanism for settlement of disputes." *Id.* This fundamental tenet also finds expression under conventional law. *See, for example, the Vienna Convention on the Law of Treaties*, May, 23, 1969, 1155 U.N.T.S. 331, art. 26, which states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." The Permanent Court of International Justice in the *Workers' Delegate* case declared that a treaty engagement "is not a mere moral obligation," but constitutes a legally binding obligation on the parties. Advisory Opinion No. 1, *Was the Worker's Delegate for the Netherlands at the Third Session of the International Labour Conference Nominated in Accordance with the Provisions of Paragraph 3 of Article 389 of the Treaty of Versailles?*, 1922 P.C.I.J. (ser. B) No. 1, at 19 (July 31).

34. The prohibition of genocide falls under the broader heading of the prohibition of arbitrary deprivation of life. Raič, *supra* note 32, at 437; *see also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

power.³⁵ Both legislatively, in the case of new laws establishing various supreme courts around the world, and judicially, in decisions by judges that are applied across a range of jurisdictions, the course of globalization has offer[ed] fundamental challenges to contemporary legal theory.³⁶ Excessive formalism and deference to the notion of parliamentary sovereignty has given way to a more pragmatic and human rights-focused approach in the judiciary of many states. This process has worked to infuse domestic legal systems with the beneficial influence of international human rights law, subject of course to human rights constraints. Through harmonization, international human rights norms are beginning to be domesticated, and are at long last "coming home" to what many believe is the most appropriate forum in which to deal with such matters.³⁷

The "cross-fertilization of legal systems," whereby the borrowing of interpretations leads to internationalization, has been described as "transjudicial communication."³⁸ Transjudicial communication can involve a legal borrowing or a legal transplant into a domestic legal system; in either situation, legal unification and integration results. Transjudicial communication is important because it erodes state power by creating symbiosis of international law and municipal law. It goes in search of a middle ground and finds that in reality many municipal judges in their interpretation already use the complex interplay between international law and internal law. In fact, if a state fails to act in a manner consistent with international law, the state may still incur responsibility on the international plane; though, the validity of the internal law remains unaffected.³⁹ Through this relationship, checks and balances are created, which are needed to restrain the power of a sovereign state.

B. *The Formal Bureaucratic Rationale of the State*

It would be a mistake, however, to conclude that states have become—or will ever become—irrelevant in the quest for human rights.

35. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15 (1998). Judicial globalization is particularly evident in the decisions of top-level appellate courts throughout the world. *Id.* at 16.

36. Twining, *supra* note 16.

37. Donald F. Woloshyn, *To What Extent Can Canadian Courts be Expected to Enforce International Human Rights Law in Civil Litigation?*, 50 SASK. L. REV. 1, 3 (1985–86).

38. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 UNIV. RICH. L. REV. 99, 99 (1994) (quoting MARY A. GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 158 (1991) ("In Europe generally . . . and in Australia, Canada, and New Zealand, national law is increasingly caught up in a process of cross-fertilization among legal systems.")).

39. SIR GERALD FITZMAURICE, *THE GENERAL PRINCIPLES OF INTERNATIONAL LAW CONSIDERED FROM THE STANDPOINT OF THE RULE OF LAW* 68, 79–80 (1957).

States provide more robust bureaucratic mechanisms for protection of individuals than is ever likely to exist at the international level. State mechanisms militate against the synchronizing effects of globalization. Even as international society gains a share of competence over internal conduct, as long as a state retains a measure of internal legitimacy vis-à-vis international regimes, self-preservation occurs through the state's bureaucratic policymaking organs. By increasing the discretionary authority it has over actions, states can strengthen their own power over internal affairs in accordance with international law. Properly deployed, a state's formal bureaucratic rationale provides a safeguard against totalitarianism and offers security to its own citizens. Thus, statehood survives and should continue to survive for the foreseeable future as long as it aims at a basic human good. O'Connell proffers that "[t]he real point is that law, being a rule for the solution of human conflicts, and deriving its distinguishing characteristic from the sense of obligation which is the source of its cohesiveness, should be harmonious and should not allow for contradictory rules of behaviour."⁴⁰ Therefore the bureaucratic rationale of the state should continue to survive for the foreseeable future until another more functional form will be found.

II. INTERNATIONAL PERSONALITY OF KOSOVA VIEWED THROUGH THE LENS OF HUMAN RIGHTS

Although human rights have developed to curtail state power, the power of the United Nations Interim Mission in Kosovo ("UNMIK") remains unlimited, as it is not subject to judicial review. This is so despite the fact that Resolution 1244,⁴¹ which authorized the creation of the Kosovo Force ("KFOR") and UNMIK, implies an obligation, as a main responsibility of the international civil presence, to apply human rights.⁴² The obligation to protect and promote human rights results as well from the U.N. Charter, which aims to solve "international problems of an economic, social, cultural, or humanitarian character," and to promote and encourage "respect for human rights and for fundamental freedoms for all."⁴³ Resolution 1244 is itself based on this principle of the U.N. Charter, which, in and

40. 1 D.P. O'CONNELL, INTERNATIONAL LAW 44 (2d ed. 1970).

41. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

42. *Id.* ¶ 11(j). The KFOR and UNMIK are public organizations created for the purpose of securing and administering the territory on behalf of the international community. John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, 12 EUR. J. INT'L L. 469, 471 (2001). KFOR is the "international security presence," while UNMIK serves as the "international civil presence." *Id.*

43. U.N. CHARTER art. 1 para. 3.

of itself, imposes human rights protection obligations on the international civil presence.

Moreover, UNMIK Regulation 1999/1,⁴⁴ as amended, provides that "[i]n exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any persons on any ground."⁴⁵ Such general provisions appear broad enough to also encompass the acts of international public administration officials. However, although the commitment in Regulation 1999/1 has been designated "the most important limitation for the exercise of international authority in Kosovo," it has been argued that it has "not been matched by actually enforceable rights *vis-à-vis* UNMIK on behalf of the residents of Kosovo."⁴⁶

Generally, it has been argued that, through Regulation 2000/47,⁴⁷ UNMIK, in its legislative capacity, gave itself and its executive actions immunity from judicial process [which] is in violation of international human rights standards and has rendered non-existent the right of Kosovars to seek a remedy for violations of their fundamental rights.⁴⁸ In particular, "the courts in Kosovo are not authorized to declare UNMIK regulations null and void and therefore inapplicable for non-conformity with the human rights instruments listed in Section 1.3 of Regulation [1999/24, as amended.]"⁴⁹

44. On the Authority of the Interim Administration in Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/1999/1 § 2 (July 25, 1999), *amended by* On the Law Applicable in Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/1999/24 § 1.3 (Dec. 12, 1999).

45. *Id.*

46. Marcus G. Brand, *Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation*, 70 NORDIC J. INT'L L. 461, 472 (2001).

47. On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2000/47 (Aug. 18, 2000).

48. Carsten Stahn, *The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis*, in 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 105, 159–61 (Jochen A. Frowein & Rüdiger Wolfrum eds., 2001).

49. *Id.* at 157. Section 1.3 of UNMIK Regulation No. 1999/24 on the law applicable in Kosovo (Dec. 12, 1999) as amended by UNMIK Regulation 2000/59 reads in pertinent part that "[i]n exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected, in particular" in: *Universal Declaration of Human Rights*, *supra* note 4; *European Convention of Human Rights*, *supra* note 7; *Covenant on Civil and Political Rights*, *supra* note 5; *Covenant on Economic Rights*, *supra* note 6; *International Convention on the Elimination of All Forms of Racial Discrimination*, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195; *Convention on the Elimination of All Forms of Discrimination Against Women*, Dec. 18, 1979, 1249 U.N.T.S. 13; *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Nov. 26, 1987, Europ. T.S. No. 126, *available at* <http://conventions.coe.int/Treaty/cn/Treaties/Html/126.htm>; and the *Convention on the Rights of the Child*, Nov. 20, 1989, 1577 U.N.T.S. 3. Amending UNMIK Regulation No. 1999/24 On the Law Appli-

Additionally, the legislative system, as a process system created through regulations established by UNMIK, is insufficient for many claims. Because the effective remedies available to Kosovar citizens to seek satisfaction of their rights are often very complicated or simply cannot be executed against UNMIK, violations of the European Convention of Human Rights may result.⁵⁰

The UNMIK Regulation on Immunities and Privileges, No. 2000/47, authorizes the establishment of *ad hoc* Commissions to preside over claims for compensation of damage.⁵¹ Under the provision, a third party can invoke the Regulation to claim compensation for property loss or damage, personal injury, illness, or death arising from or directly attributed to KFOR, UNMIK, or their personnel that do not arise from "operational necessities" of KFOR or UNMIK.⁵² In its entirety, Regulation 2000/47 creates immunity from legal action for KFOR and UNMIK, including against UNMIK's four "pillars"⁵³ led by the United Nations, the United Nation's High Commissioner for Refugees ("UNHCR"), the Organization of Security and Co-operation in Europe ("OSCE"), and the European Union.⁵⁴ Such immunity is problematic, as it runs counter to principles of accountability for public servants and, although this immunity may be waived, it is entirely dependent on the discretionary power of the Special Representative of the Secretary-General ("SRSG").⁵⁵

In practice the authority of UNMIK is unrestrained; the SRSG, UNMIK's chief administrator, exercises unlimited legislative, executive, and judicial authority.⁵⁶ From a human rights perspective, there is no other

cable to Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2000/59 § 1.3 (Oct. 27, 2000).

50. Section 1.3 of Regulation 1999/24, as amended, provides the human rights instruments to be observed, such as the Universal Declaration of Human Rights or the European Convention on Human Rights and its Protocols. See *supra* note 49 for a list of these instruments. Complicated administrative procedures for the execution of the rights can be invoked based on Art. 5 and 6, together with Art. 13 (Right to Effective Remedy) of the ECHR. European Convention on Human Rights, *supra* note 7, at arts. 5, 6, 13.

51. Even in its use of *ad hoc* Commissions, UNMIK demonstrates its lack of respect for the rights to a fair hearing under Article 6 of the ECHR. A Commission is established and operates on an *ad hoc* basis. However, procedures provide only the right for damage compensation and do not provide a remedy for citizens to realize a right or claim.

52. UNMIK/REG/2000/47 § 7.

53. Cerone, *supra* note 42, at 472.

54. UNMIK/REG/2000/47 § 1.

55. *Id.* § 6.1.

56. Section 1.1 of UNMIK Regulation 1999/24 on the Law Applicable in Kosovo, provided that "[t]he law applicable in Kosovo shall be: (a) [t]he regulation promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b) [t]he law in force in Kosovo on 22 March 1989." The Regulation further specifies that "[i]n case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence." UNMIK/REG/1999/24 § 1.1,

higher forum that would review UNMIK's activities.⁵⁷ Without a clear legal framework for the realization of rights and a mechanism for the restraint of excessive state power, the disproportionate authority concentrated in the SRSG could go unchallenged and be applied unfairly. The obligation to uphold internationally recognized human rights standards, including antidiscrimination principles, could be rendered meaningless.

III. INTERNATIONAL PERSONALITY OF KOSOVA VIEWED THROUGH THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

KFOR, in the course of its actions, has committed a number of violations of the human rights standards set forth in the ECHR.⁵⁸ Most notably, both UNMIK and KFOR have reportedly violated international human rights principles by detaining individuals in contravention of judicial orders of release and without providing mechanisms for detainees to challenge their detention.⁵⁹ Even though KFOR is a military organization and under a separate chain of command as UNMIK,⁶⁰ at the request of UNMIK officials, KFOR also performs civil tasks in Kosova.⁶¹

Because UNMIK is responsible for protecting and promoting human rights, "KFOR's obligation to support UNMIK requires that it, at the very least, refrain from undermining this objective [which] . . . can only be achieved through compliance with international human rights standards [by KFOR]."⁶² Therefore, at a minimum, when KFOR undertook law enforcement activities, it was required to uphold the same standards as bound the U.N. civil administration.⁶³ Moreover, the Ombudsperson of Kosova, in

amended by Amending UNMIK Regulation No. 1999/1, as Amended, on the Authority of the Interim Administration in Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2000/54 (Sept. 27, 2000).

57. Davide Marshall & Shelly Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 102 (2003).

58. The ECHR is directly applicable in Kosovo according to UNMIK Regulation 1999/24 and the Constitutional Framework for Provisional Self-Government, U.N. Interim Administration in Kosovo, U.N. Doc. UNMIK/REG/2001/9 ch. 3 (May 15, 2001), *available at* <http://unmikonline.org/constframework.htm>.

59. Carsten Stahn, *International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead*, 61 HEIDELBERG J. INT'L L. 107, 152-53 (2001).

60. Under Security Council Resolution 1244, KFOR and UNMIK are to "coordinate closely" with each other, though, separate entities are responsible for their establishment and they are placed under distinct chains of command. S.C. Res. 1244, *supra* note 41, ¶¶ 6, 9(f).

61. The civil tasks are usually performed by police forces and involve things such as arresting suspects and protecting property. Michaela Salamun, *Democratic Governance in International Territorial Administration* (2004) (unpublished Ph.D. dissertation, University of Graz).

62. Cerone, *supra* note 42, at 473-74.

63. Salamun, *supra* note 61.

principle, is not authorized to receive complaints of abuses of individual rights committed by KFOR.⁶⁴

A. Decisions of the European Commission of Human Rights

It is scarcely possible to say that Kosovars have proper mechanisms to protect their rights. Consider, in this regard, the decisions of the European Commission of Human Rights concerning the immunity of the European Space Agency ("ESA") from German jurisdiction, particularly *Beer v. Germany* and *Waite v. Germany*.⁶⁵ In these cases, the Commission found that "the legal impediment to bringing litigation before the German Courts, namely the immunity of the European Space Agency from German jurisdiction [was] only permissible under the Convention if there [was] an equivalent legal protection."⁶⁶ The Commission considered whether Germany's grant of immunity to the ESA was a violation of Article 6(1) of the ECHR, and held that any limitation on the right of access to court had to be grounded in "a legitimate aim [and have] a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."⁶⁷

This approach was then followed by the European Court of Human Rights while giving particular weight to the question "whether the applicants had available to them reasonable alternative means to protect effectively their rights under the convention."⁶⁸ The decision of the European Court of Human Rights was clear: where the Agency has immunity, the citizen must be given either alternative equivalent protection or access to the Court. Accordingly, the Court's decision confirms that because Kosovar citizens do not have an alternative effective remedy to seek their claim, Kosovar citizens should have access to the European Court of Human Rights. Because UNMIK is immune from suit in the courts of Kosova, under the ESA decisions, UNMIK must be accountable, otherwise the European Convention on Human Rights,⁶⁹ and other mechanisms like International Covenant on Civil and Political Rights, which the U.N. has expressly made applicable to Kosova, are violated.

64. On the Establishment of the Ombudsperson Institution in Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2000/38 § 3.4 (June 30, 2000).

65. See Stahn, *supra* note 59, at 147 (citing *Beer v. Germany*, App. No. 28934/95, 30 Eur. H.R. Rep. 261 (Feb. 18, 1999) (Court report); *Waite v. Germany*, App. No. 26083/94, 30 Eur. H.R. Rep. 261 (Feb. 18, 1999) (Court report)).

66. *Id.* at 147.

67. *Id.*

68. *Id.* at 147–48.

69. This is because there is no alternative form in which defendants may be made accountable.

B. *Kosovar Cases in the ECHR*

In general, because there is no effective alternative remedy to protect Kosovar rights, the option of bringing claims in the European Court of Human Rights is the only dimension through which Kosova may acquire an international personality.⁷⁰ Kosova's international personality would be partially forged when the European Convention of Human Rights is applied against KFOR. Even though Kosovar citizens likely have standing in the Court, because Kosova cannot sign the European Convention on Human Rights, no remedy is available to a Kosovar citizen that brings a claim in the Court.

The first attempt to bring a claim by a Kosovar in the European Court of Human Rights invoked Article 1 of the ECHR, the Right to Life, which is a norm *jus cogens*.⁷¹ This case is still pending; a decision on admissibility or inadmissibility has not yet been given, although one has been communicated to the respondent government of the relevant KFOR-contributing country.⁷² The application is based on the "effective power" that KFOR exercises in the territory of Kosova, and the "jurisdiction" that member states of the Council of Europe can be said to exercise through their KFOR troops, meaning that state agents of member states are obliged to protect and respect human rights in the territory where they exercise effective power. Council of Europe state members should be held liable when their state agents, in this case KFOR troops, fail to execute "effective power" to protect the human rights of citizens.⁷³

C. *The Insufficiency of the International Personality of Kosova Through the ECHR*

Although the ability to obtain a remedy in the ECHR would be an important component of human rights protection in Kosova, that Court's jurisdiction alone would not be sufficient for the protection of human rights, nor would the international personality of Kosova be complete through

70. In international law, "legal personality" refers to the capacity of a legal person to enjoy rights and to be burdened with duties. Under the Westphalian system, only states have a legal personality in international law.

71. *Behrami v. France*, App. No. 71412/01 (pending in the European Court of Human Rights), decision communicated Sept. 16, 2003, as reported by European Court of Human Rights Information Booklet No. 56. The case alleges negligence of French KFOR troops in the death of a child in the explosion of a bomb in Kosovo.

72. *Behrami v. France* is based on an analogous application of the decision of the court in *Loizidou v. Turkey*, App. No. 15318/89, 23 Eur. H.R. Rep. 513 (Dec. 18, 1996) (Court report).

73. Nuola Mole, Address as the Director of the Center on Advice on Individual Rights in Europe (May 2000).

access to the Court alone. The standards contained in the European Convention on Human Rights are directly applicable in the territory of Kosova, and yet the standards, and the Convention itself, cannot be invoked in their full parameters, at least not to the full extent of truly protecting human rights, because Kosovar citizens have no control over the legislative, executive, or judicial processes in Kosovo.

Without any meaningful participation in the government by Kosovar citizens, and especially because those citizens have no remedy as against UNMIK or KFOR in the national courts, human rights protection relies on conceptually independent, political institutions to define those rights. Therefore, human rights cannot form the meaningful basis for a social order.⁷⁴ If Kosovar citizens are to define our polity in terms of human rights, we first need to know the number and content of such rights. But we cannot ascertain our rights because rights are created through political processes, over which we have no control and which are best exercised within a state that is itself obligated under international law. Human rights, as social norms, owe their existence and meaning to decision-making processes.

No form other than statehood can guarantee social order; even globalization, as noted by Henkin, does not herald the "withering away of the state."⁷⁵ The problem with defining the polity in terms of human rights is exemplified in Kosova and the policy of "Standards before Status."

The executive, legislative, and judicial processes in Kosova are out of Kosovar hands, but political processes create human rights. The bureaucratic rationale of statehood, because it is obligated under international law to protect human rights, provides security to its citizens in that citizens have a remedy in access to the national courts. When a citizen's right or claim is not satisfied, there is a place for international law. International law provides citizens of a national state with an effective remedy, under certain conditions, to satisfy their claim. Through this process, international law and national law work in harmony, providing checks and balances instead of the superiority of any laws. Statehood for Kosova is necessary before "standards" can be met;⁷⁶ it is through the checks and balances of a system of international as well as national law that the rule of law in Kosova can be improved. Currently, both components are missing in Kosova. A system of international and national law is more sensical than the setting

74. Koskenniemi, *supra* note 12, at 399.

75. Henkin, *supra* note 23, at 7.

76. "Standards before Status" is the policy set up by UNMIK to postpone the final status for Kosova. One of the standards is improving rule of law in Kosovo.

of standards that have been characterized as difficult, if not impossible, for any developing state to achieve.

CONCLUSION

Kosova shows that human rights alone cannot form a meaningful basis for a social order, because without a state, the protection of human rights relies on conceptually independent political institutions to define rights. UNMIK exercises the legislative, executive, and judiciary systems through the SRSG. The SRSG has unlimited power; UNMIK and KFOR have immunity and cannot be sued in the national courts of Kosova. Therefore, the citizens of Kosova are deprived of access to the Court against either UNMIK or KFOR. On the other hand, an "alternative equivalent remedy" is not available to the citizens of Kosova. In this respect, Kosovar citizens, as against KFOR, are applying directly to the European Court of Human Rights. The availability of a remedy in the European Court would be the humble beginnings of an "international personality" for Kosovo. This international personality, however, is insufficient; only sovereign statehood provides a complete basis for citizens to participate in a political process, through which citizens can protect human rights and achieve the "standards" required for Kosova. Currently, Kosovar citizens are not in a position to defend their human rights; therefore, statehood is necessary before the international community's "standards" can be met.